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# In The Supreme Court of the United States

OCTOBER TERM, 1969

No. 621

FREDERICK WISEMAN, et al.,
*Petitioners*

v.

COMMONWEALTH OF MASSACHUSETTS, et al.,
*Respondents*

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS

The respondents respectfully pray that the petition of Frederick Wiseman and Bridgewater Film Company, Inc., for a writ of certiorari to the Supreme Judicial Court for the Commonwealth of Massachusetts in the case of *Commonwealth* v. *Wiseman* be denied.

## OPINIONS BELOW

The opinion of the Supreme Judicial Court for the Commonwealth of Massachusetts (which is set out in Appendix A to the Petition) is reported in Mass. Adv. Sh. (1969) 1055 and in 249 N.E.2d 610 (1969). It has not yet been reported in the official Massachusetts Reports.

The opinion of the Superior Court for Suffolk County (Massachusetts) (which is set out in Appendix B to the Petition) is not reported in any official or unofficial reporter.

## STATEMENT OF THE CASE

### Prior Proceedings

The respondents[1] brought a suit in equity in the Superior Court for Suffolk County (Massachusetts) against the petitioners and others to enjoin further showings of a film made by the petitioner Frederick Wiseman ("Wiseman") at Massachusetts Correctional Institution, Bridgewater ("Bridgewater"), on the grounds that Wiseman had breached the terms of his agreement with state officials allowing the film to be made and that the showing of the film violated the rights to privacy of inmates portrayed in it. (R.1-19) After trial, the court made extensive findings of fact and rulings of law (R.43-58) holding basically for the respondents and, *inter alia,* enjoined all further showings of the film (R.60-61). Thereafter the petitioners appealed to the Massachusetts Supreme Judicial Court which affirmed the findings of fact and rulings of law of the Superior Court, but modified the relief granted because it was too sweeping in scope. *Commonwealth* v. *Wiseman,* Mass. Adv. Sh. (1969) 1055, 249 N.E.2d 610.

### Statement of Facts[2]

In 1965 Wiseman requested of John A. Gavin, Massachusetts Commissioner of Correction, and Charles W. Gaughan, Superintendent of Bridgewater, permission to make an educational documentary film about Bridgewater. (A-31 n.1, 32; B-45) His request was initially denied. (A-32; B-45) Thereafter his request was reconsidered and on January 28,

[1] The parties are referred to herein by their designations in this Court. The various petitioners and respondents are distinguished only in so far as is relevant to the issues here considered.

[2] After eighteen days of trial, the Superior Court made extensive findings of fact and rulings of law. (R.43-58) Thereafter, on appeal to the Massachusetts Supreme Judicial Court, the petitioners attacked various findings of fact of the trial court. See *Commonwealth* v. *Wiseman,* Mass. Adv. Sh. (1969) 1055, 249 N.E.2d 610, BRIEF FOR THE RESPONDENTS FREDERICK WISEMAN AND BRIDGEWATER FILM COMPANY, INC., pp. 28-36. The respondents devoted a substantial portion of their brief

1966, permission was granted subject to receipt of an Opinion of the Massachusetts Attorney General that the officials could legally permit such filming, and subject to each of the following conditions to which Wiseman agreed:

(a) "that the rights of inmates and patients at Bridgewater [be] fully protected";

(b) that Wiseman use only "photographs of inmates and patients who are legally competent to sign releases";

(c) that Wiseman "obtain a written release from each patient whose photograph is used in the film"; and

(d) that the film not be exhibited without first being viewed and approved by the Commissioner and the Superintendent (A-32; B-45-46).

On March 21, 1966, Hon. Edward Brooke, the then Attorney General for the Commonwealth, gave an opinion to the Commissioner that he could permit such a film to be made if the Superintendent consented. (A-32; B-46; see also 1965-66 Op. Mass. Atty. Gen. 290) From the representations made by Wiseman in seeking permission to make the film the officials of the Commonwealth reasonably concluded that the film was to be a "non-commercial and non-sensational" project. (A-33; B-49)

Permission to commence filming was thereafter granted (A-32; B-46) and Wiseman and his film crew shot eighty thousand feet of film over a three month period beginning

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to showing that these findings were supported by the evidence in every material particular. *Id.*, BRIEF FOR THE PETITIONERS AS APPELLEES, pp. 10-31. The Supreme Judicial Court has upheld these findings. See *Commonwealth* v. *Wiseman*, Mass. Adv. Sh. (1969) 1055, 1056-59, 1060-61, 249 N.E.2d 610, 612-14, 615. Nevertheless the petitioners have stated not the facts as found by the Massachusetts courts, but "facts" for which they purport to find support in the transcript of evidence (145 of the 158 citations in the Statement of Facts in the Petition are to the transcript). It is therefore necessary to state the facts of the case here. Hereinafter references to the decisions of the Massachusetts courts will be to the Petition, Appendix A (Opinion of the Massachusetts Supreme Judicial Court) and Appendix B (Findings, Rulings and Order for Decree of the Suffolk County Superior Court). References are by letter designating the appendix and page number of the Petition, *e.g.* "A-41", "B-52".

in April, 1966 (A-32; B-47). The film crew took pictures of mentally incompetent patients who were in the nude and in most personal and private situations. (A-32-33; B-47) Of sixty-two inmates filmed at this time who are identifiable in the completed film some were incompetent to understand a release (A-37; B-53) and releases were obtained from only eleven or twelve (A-37; B-53).

After editing, the film was shown to the Superintendent for the first time on June 1, 1967, and he objected, among other things, to the excessive nudity. (A-33; B-53) Hon. Elliot Richardson, the then Attorney General for the Commonwealth, viewed the film later that month and raised several questions in regard to whether it could legally be shown to the public. (A-33; B-53-54) At a conference on September 21, 1967, Attorney General Richardson informed Wiseman and his legal advisers that in his opinion the film could not be shown in its present form because it was an invasion of the privacy of inmates shown, mentally incompetent inmates were shown, and any releases obtained by Wiseman were invalid. (A-33; B-54-55) The Commissioner viewed the film for the first time that evening and informed Wiseman the next day that the film could not be shown "in its present form". (A-33-34; B-55) In September, 1967, Wiseman arranged with Grove Press, Inc. for commercial distribution of the film and the film was shown to the general public in commercial motion picture theaters in New York City in the autumn of 1967.[3] (A-34; B-56-57)

Both the Massachusetts Supreme Judicial Court and the Suffolk County Superior Court concluded that further

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[3] The film was also shown to the general public at "The Cinema Village" in New York City after this case was argued before the Massachusetts Supreme Judicial Court. See, *e.g.*, NEW YORK TIMES, June 18, 1969, at 33; *id.*, July 14, 1969, at 32. The advertisement in the June 18 edition of the *New York Times* read: "NOW IT CAN BE SEEN! *1st SHOWING IN 2 YEARS* The EXTENDED AMERICAN PREMIER of TITICUT FOLLIES 'Makes Marat/Sade look like Holiday on Ice.'—N.Y. TIMES."

showings of the film should be enjoined on two independent grounds:[4]

(1) that the film constituted an unwarranted invasion of the privacy of inmates shown and no legitimate public interest in the inmates themselves (as opposed to the institution) warranted the publication of identifiable pictures of the inmates filmed (A-37-42; B-57-58, 59); and

(2) that Wiseman had violated each[5] of the conditions to which he had agreed when he was granted permission to make the film and these conditions were imposed by the Commissioner and the Superintendent as a reasonable means of performing their duty to protect inmates under the control of the Commonwealth from invasion of their rights by Wiseman (A-36-37, 39, 41; B-52-53, 58-59).

The respondents respectfully submit that the petitioners' prayer a writ of certiorari to the Supreme Judicial Court of Massachusetts to review these rulings should be denied.

## REASONS FOR DENYING THE WRIT

### I. The First Issue in the Petition Is Stated Without Reference to the Terms and Circumstances of the Case in Violation of Rule 23(c) of This Court and Presents No Case or Controversy over Which This Court Has Jurisdiction.

Rule 23(c) of this Court requires that the questions presented for review be "expressed in the terms and cir-

[4] The Supreme Judicial Court modified the decree of the Superior Court to permit showings to "legislators, judges, lawyers, sociologists, social workers, doctors, psychiatrists, students in these or related fields, and organizations dealing with the social problems of custodial care and mental infirmity." (A-42, 43)

[5] The Massachusetts Supreme Judicial Court found it unnecessary to rely on Wiseman's violation of the fourth condition requiring approval by the Commissioner and the Superintendent (A-36); but it did uphold the findings of the Superior Court that such a condition had been agreed to (A-32) and that it was violated (A-33-34).

cumstances of the case". The first issue as stated by the petitioners clearly violates this rule. It contains no reference whatever to the grounds on which the showing of the film was enjoined by the Massachusetts courts — invasion of privacy and breach of contract — nor are these grounds referred to anywhere in the argument on Point I. In fact, the argument consists primarily of a misrepresentation of the grounds of decision in the Massachusetts courts as being the protection of the public from exposure to the film rather than the protection of the inmate "actors" from exposure to the public. See PETITION, pp. 15-19. For example, the petitioners allege that the court enjoined showing to members of the general public because they "might view the film and be unable to comprehend its message". PETITION, p. 17. In fact the court held that the showing of the film would violate the rights of inmates shown and breach the terms of the permission granted to make it, but that the possible benefits from showings to the specialized and professional audiences enumerated in note 4 (*supra* at 5) outweighed whatever harm such showings might do the inmates.

The deficiency in the statement and argument of petitioners' first issue goes beyond mere violation of a technical rule. By omitting reference to the facts of the case and misrepresenting the opinion of the Massachusetts Supreme Judicial Court, the petitioners drift into purely abstract questions of constitutional law which have no connection with the case at bar. Such questions fail to present this Court with a case or controversy and are therefore not within its jurisdiction. See U.S. CONST. art. 3, §2, cl. 1.

## II. THE PRINCIPLE OF UNCONSTITUTIONAL CONDITIONS IS NOT NOVEL AND IT WAS APPLIED BY THE MASSACHUSETTS SUPREME JUDICIAL COURT CONSISTENTLY WITH THE DECISIONS OF THIS COURT.

There is nothing novel about the principle of "unconstitutional conditions". It was recognized by this Court as

early as 1926 in *Frost & Frost Trucking Co.* v. *Railroad Commission of California,* 271 U.S. 583, 593-94 (1926). The fact that this Court has not yet had occasion to apply it to the making of a film in a state correctional institution does not mean that this case presents "a federal question of substance not [heretofore] determined by this court". SUP. CT. RULE 19(1)(a). Only the fact situation in this case is novel; the applicable principle is well-established.

Although the Massachusetts Supreme Judicial Court did not in its opinion discuss the decisions of this Court involving unconstitutional conditions, it is clear from its citation to "note, 73 HARV. L. REV. 1595" (A-41) that it considered those decisions. The Harvard Law Review note contains a discussion of the cases involving unconstitutional conditions and an analysis of their rationale and application.

It is also clear that the Massachusetts Supreme Judicial Court applied the principle consistently with the most recent decisions of this Court. See *Tinker* v. *Des Moines Independent Community School Dist.,* 393 U.S. 503, 512-13 (1969), citing with apparent approval *Burnside* v. *Byars,* 363 F.2d 744 (5th Cir. 1966), and *Blackwell* v. *Issaquena County Board of Education,* 363 F.2d 749 (5th Cir. 1966); *Pickering* v. *Board of Education,* 391 U.S. 563, 568 (1968). These decisions recognize that a state may impose on teachers and students regulations reasonably designed to protect the interests of the state in maintaining in its schools an orderly atmosphere conducive to education. The Massachusetts Supreme Judicial Court recognized that similar considerations apply to state correctional institutions which are not ordinarily open to the general public. See *Adderley* v. *Florida,* 385 U.S. 39, 41, 47-48 (1966).

The reasoning of the court in regard to the conditions imposed in this case (A-38-41) was as follows: The Commonwealth of Massachusetts has a duty, which its legislature has recognized by statute, to care for and protect

inmates of its correctional institutions who are under its control and therefore unable to protect themselves.[6] The performance of this duty is entrusted to the Massachusetts Commissioner of Correction and, in the case of Bridgewater, to the Superintendent of that institution. The action of those officials in conditioning permission to make a film at Bridgewater on obtaining written releases from inmates filmed and using films only of inmates competent to sign releases was a reasonable means of performing that duty and protecting the inmates from exploitation at the hands of a filmmaker such as Wiseman.[7] These conditions are therefore valid and the only feasible means of enforcing them is by properly limited injunctive relief. This reasoning is fully "in accord with applicable decisions of this court". SUP. CT. RULE 19(1)(a).

## III. THE DECISION OF THE MASSACHUSETTS SUPREME JUDICIAL COURT IS IN ACCORD WITH THE DECISION OF THIS COURT IN *Time, Inc.* v. *Hill.*

The Massachusetts Supreme Judicial Court properly distinguished *Time, Inc.* v. *Hill,* 385 U.S. 374 (1967), and *Julian Messner, Inc.* v. *Spahn,* 387 U.S. 239 (1967), *vacating and remanding* 18 N.Y.2d 324, 221 N.E.2d 543 (1966). Each of those decisions involved the type of invasion of privacy known as publicity placing a person in a false light. See RESTATEMENT (SECOND) OF TORTS §652E (Tent. Draft No. 13, 1967). Since the interest of the individual protected by

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[6] The court held that such a duty existed as a matter of state law and therefore found it unnecessary to consider whether the fourteenth amendment also imposes such a duty on the states as argued by the Civil Liberties Union of Massachusetts. See *Commonwealth* v. *Wiseman,* Mass. Adv. Sh. (1969) 1055, 249 N.E.2d 610, BRIEF OF CIVIL LIBERTIES UNION OF MASSACHUSETTS, AMICUS CURIAE, pp. 6-8.

[7] The court found it unnecessary to consider the condition requiring the approval of the Commissioner and the Superintendent prior to showing the completed film; but this condition was a reasonable means of securing compliance with the other conditions and thereby protecting the rights of the inmates (see Tr. 5-61 to 5-63).

this branch of the law of privacy is quite similar to that protected by the law of defamation, this Court in *Time, Inc.* v. *Hill* applied to it the test of knowledge of the falsity of the publication or reckless disregard for its truth or falsity which was established as to defamation by *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964). See *Time, Inc.* v. *Hill*, 385 U.S. 374, 380-91 (1967).

The case at bar, on the other hand, involves the type of invasion of privacy known as publicity given to private life. See RESTATEMENT (SECOND) OF TORTS §652D (Tent. Draft No. 13, 1967). The interest protected by this branch of the law of privacy is the sensibility of every person to the embarrassment of the publication of the most private and intimate details of his life. Effective public debate does not require the publication of such details. See Nimmer, *The Right To Speak from* Times *to* Time*: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CALIF. L. REV. 935, 962 (1968). Furthermore, the injury from such publication, unlike the injury from false publications, is not one which can be cured by more speech. *Id.* at 961. This Court recognized in *Time, Inc.* v. *Hill*, 385 U.S. 374, 383 n.7 (1967), that these distinctions between the two branches of the law of privacy were sufficiently significant to distinguish them constitutionally. The decision of the Massachusetts Supreme Judicial Court making such a distinction was therefore "in accord with applicable decisions of this court".[8] SUP. CT. RULE 19(1)(a).

The Massachusetts Supreme Judicial Court further distinguished *Time* on the ground that the inmates were not

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[8] There is, of course, no inconsistency between the decision of the Massachusetts Supreme Judicial Court and that of the District Court for the Southern District of New York in *Cullen* v. *Grove Press, Inc.*, 276 F. Supp. 727 (S.D.N.Y. 1967). As the court below recognized (A-42), the *Cullen* case involved only correction officers at Bridgewater who were depicted in the film quite differently from the inmates whose interests the Commonwealth represents in this case.

public figures within the *Time* rule. (A-40-41) In *Time* the public interest was in the experiences of the Hill family with three escaped convicts who held them captive in their own home. These experiences were the subject of the *Life Magazine* article involved. In this case the interest is in Bridgewater as an institution and not in any of the individual inmates confined there. This public interest would protect publications about the institution, but it does not make every inmate a public figure so as to protect the publication of recognizable pictures of him. The Massachusetts Supreme Judicial Court held that publication of such pictures was not an essential part of free debate about conditions at the institution. This distinction is also "in accord with applicable decisions of this court". SUP. CT. RULE 19(1)(a).

## CONCLUSION

For the reasons stated above the Court should deny a writ of certiorari.

Respectfully submitted,

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